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No. 89-163

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a failure to observe the "first appearance" requirement of the Bail Reform Act, 18 U.S.C. 3142(f) (Supp. V 1987), requires the release of a person who would otherwise be subject to pretrial detention.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 876 F.2d 826. The opinion of the district court (Pet. App. 16a-31a) is reported at 713 F. Supp. 1407.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a) was entered on May 31, 1989. The petition for a writ of certiorari was filed on July 28, 1989, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 3142(f) of the Bail Reform Act of 1984, 18 U.S.C. 3142(f) (Supp. V 1987), provides in pertinent part:

> *Detention Hearing.*—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—
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> * * * * *
>
> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. * * *

STATEMENT

The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, provides that persons charged with certain serious offenses shall be detained prior to trial if "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(e) (Supp. V 1987). The Act further provides that the government or the judicial officer may initiate detention proceedings and that a detention hearing "shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance." 18 U.S.C. 3142(f) (Supp. V 1987). In this case, the district court found that no release conditions would assure respondent's appearance at trial or ensure that he would not pose a danger to the community. Nonetheless, the district court and the court of appeals both concluded that respondent was entitled to pretrial release because there had been a failure to observe the "first appearance" provision of the Bail Reform Act.

1. On Wednesday, February 8, 1989, at approximately 3:30 a.m., United States Customs Service agents stopped respondent at a highway checkpoint north of Orogrande, New Mexico, near the Mexican border. The agents questioned respondent, who was the lone passenger of a pickup truck, concerning his citizenship. Respondent produced papers showing that he was a Mexican citizen legally residing in the United States. The agents then examined respondent's truck. They noted that it had been mounted with an auxiliary gas tank but that the tank was not connected to the engine. Upon further examination, they found that the tank had been fitted with a concealed door. Opening that door, the agents discovered approximately 72 pounds of cocaine, which had a wholesale value of almost $1 million. The agents also found $6,500 in U.S. currency concealed in the passenger section of the truck. Pet. App. 4a, 17a, 21a, 23a; Tr. 73-77 (Feb. 23, 1989).

The agents transported respondent to the Customs Service's local office, where they read respondent his rights and explained them to him. Respondent stated that he had intended to deliver the cocaine to purchasers in Chicago, Illinois. He agreed to cooperate with the Drug Enforcement Agency (DEA) by making a "controlled delivery" under government surveillance. Later that day, several DEA agents escorted respondent by air carrier to Chicago, while another agent drove respondent's pickup truck to that destination. The agents parked the truck at a location in Chicago designated by respondent, but the anticipated purchasers failed to appear to co...plete the transaction. Meanwhile,

on Friday, February 10, 1989, the government filed a criminal complaint in the United States District Court for the District of New Mexico charging respondent with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (1982 & Supp. V 1987). Pet. App. 4a-5a, 17a-18a; Tr. 81-82 (Feb. 23, 1989).

2. Arrangements were then made to transfer respondent back to New Mexico. A magistrate in the District of New Mexico issued a warrant for respondent's arrest, and respondent was taken before a magistrate in the Northern District of Illinois for a transfer hearing pursuant to Fed. R. Crim. P. 40. The magistrate in Illinois advised respondent, who was represented by a public defender, that he faced criminal charges in New Mexico. A local Assistant United States Attorney then explained that "the government was going to move for detention." J.A. 16. After consulting with respondent's counsel, however, the Assistant United States Attorney said that the parties had agreed that if respondent were returned immediately to New Mexico, "we would not hold the detention hearing here and they would waive their right at this point and, however, not waive any rights to preliminary hearings or detention hearings in that district." *Ibid.* The magistrate asked whether respondent consented to the agreement, and he replied through an interpreter, "Yes. They want me to, I am with them." *Id.* at 18. The magistrate indicated that he would "enter an order of removal specifically reserving the issues of * * * detention and probable cause for determination by the District Court in New Mexico." *Id.* at 19. Respondent was returned to New Mexico on the same evening, Friday, February 10, and was placed in the custody of local officials. Pet. App. 5a-6a, 18a-19a.

3. On Monday morning, February 13, 1989, the DEA asked the United States magistrate's office in New Mexico to arrange for respondent's detention hearing. The

magistrate's office scheduled the hearing for Thursday, February 16. At the February 16th hearing, the magistrate described the charges against respondent, who was represented by retained counsel, and read him his rights. The magistrate then verified that the Pretrial Services Office had not yet prepared a report on respondent. The magistrate stated:

> All right. I think, therefore, in the interest of judgment [*sic*, justice], that I should continue the detention hearing for a maximum of three working days, as the United States wishes to request. The detention and motion for detention will need to be filed. Otherwise, I will review the conditions of release and consider those within three working days.

J.A. 23.[1] After observing that Monday, February 20, was a federal holiday, the magistrate rescheduled the hearing for Tuesday, February 21. *Ibid.* The government filed a formal motion for detention on February 17, and the magistrate held the detention hearing, as scheduled, on February 21. At the conclusion of the hearing, the

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[1] Although the magistrate's statement suggests that the United States desired a continuance, the district court concluded that neither the government nor respondent formally moved for a continuance and that they apparently were prepared to proceed with the detention hearing on February 16. See Pet. App. 19a. Respondent's counsel (who, like the government attorney, had not been present at the Illinois proceeding) did not specifically object to the continuance, but she did contend that the government had failed to move for detention in proceeding before the Illinois magistrate, stating that "it's my understanding that the government is required to move for detention in Chicago where [the defendant] had his initial appearance. I think that he waived his identity hearing, but I don't believe he waived the detention hearing at that point." J.A. 23. The New Mexico magistrate responded that "that's a matter we will have to take up – you can take up with the district judge if you want to." *Ibid.*

magistrate decided to release respondent upon the posting of a $50,000 bond and compliance with other conditions and restrictions. Pet. App. 6a-8a, 19a-20a; J.A. 24-38.

4. The government immediately requested that the district court review the magistrate's decision (see 18 U.S.C. 3145(a)(1) (Supp. V 1987)), and the district court held a *de novo* detention hearing on February 23, 1989. The government submitted that respondent posed both a risk of flight and a danger to the community. Tr. 28, 121-128 (Feb. 23, 1989). Respondent contested that submission, *id.* at 108-120, 128-130, and argued that he was entitled to release because the detention hearing had not been held within the time limits set forth in the Bail Reform Act. *Id.* at 11-12, 17, 29-31.

On March 1, the district court ruled on the detention motion. The court found that respondent "has failed to rebut the resulting statutory presumption that no condition or combination of conditions will reasonably assure [his] appearance as required and the safety of the community." Pet. App. 16a; see *id.* at 21a-24a. The court further concluded, however, that "there has been a failure to comply" with the Bail Reform Act's procedural provisions, "which precludes further detention of [respondent] and mandates the setting of conditions for his release." *Id.* at 16a-17a.

The district court relied on Section 3142(f) of the Bail Reform Act, which states that a detention hearing "shall be held immediately upon a person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance" and further provides that "[e]xcept for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the attorney for the government may not exceed three days." See Pet. App. 24a-26a.

The district court concluded that the Illinois magistrate's February 10th removal order and the New Mexico

magistrate's February 16th *sua sponte* continuance, which was granted "in the interest of justice," Pet. App. 19a, resulted in a violation of Section 3142(f)'s time limits. *Id.* at 24a-30a. The court stated that a person may waive those time limits but concluded that respondent did not "knowingly and voluntarily" waive his right to a prompt hearing. *Id.* at 27a-28a, 30a.

Turning to the issue of the appropriate remedy, the court acknowledged that "Congress did not explicitly state that a failure to comply with § 3142(f) mandates" pretrial release. Pet. App. 31a. The court nevertheless concluded that "meaning can be given to § 3142(f) and Congress' intent can be fulfilled only by pretrial release under conditions." *Ibid.* The court amended the magistrate's release conditions to require bond in the amount of $88,500 and issued an order allowing respondent's release. *Id.* at 16a-17a, 31a.

5. The government appealed and requested a stay of the district court's order. The court of appeals issued a temporary stay but ultimately affirmed the district court's ruling. Pet. App. 1a-15a. The court of appeals concluded that "although the delay between the [respondent's] appearance in Illinois on February 10 and his first appearance in New Mexico on February 16 might be viewed as a minor violation of the maximum permissible period for a defense requested continuance, the further continuance of the hearing by the magistrate, *sua sponte*, constituted a material violation of the specific instructions Congress provided in crafting § 3142(f)." Pet. App. 13a. The court further stated:

> If the mandatory restrictions on the length of time a hearing can be continued, delayed, or postponed are to have any import, we believe the consequences for violations, at least where material and not the fault of the defendant, must likewise be substantive. Under the circumstances of this case, the subsequent holding of

> a *de novo* hearing by the district court did not cure the fact that the New Mexico magistrate was without authority to extend the date of the hearing from February 16 to February 21 absent a finding of good cause. Thus, the district court was correct in selecting the only meaningful remedy available—release on conditions.

Id. at 14a-15a.

Since his release, respondent has failed to appear, as required, for subsequent court appearances. Respondent's counsel has confirmed that respondent is a fugitive. See Br. in Opp. 4. He is believed to have fled to Mexico.[2]

SUMMARY OF ARGUMENT

The Bail Reform Act of 1984 specifies the standards that judicial officers are to apply and the procedures that they are to follow in making pretrial release and detention decisions. See 18 U.S.C. 3142 (Supp. V 1987). The Act provides that upon motion for detention, a judicial officer shall hold a detention hearing "immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance." 18 U.S.C. 3142(f) (Supp. V 1987). But the Act does not specify the consequences of a judicial officer's failure to comply with that requirement.

The court of appeals erred in holding that a failure to comply with the first appearance provision entitles a person who would otherwise qualify for pretrial detention to automatic release on conditions. That sweeping remedy finds no warrant in the Bail Reform Act and is inconsistent with this Court's admonition that judicial remedies

[2] On June 9, 1989, the district court issued a warrant for respondent's arrest, and on August 1, 1989, the court entered an order forfeiting respondent's bond. Further proceedings in the district court are being held in abeyance until respondent is reapprehended. See J.A. 8-10.

should be tailored to the injury suffered and should not impinge unnecessarily on competing interests. As this case demonstrates, the court's remedy produces irrational results at great cost to society and the criminal justice system.

Under the court of appeals' ruling, virtually any infraction of the ambiguously phrased first appearance provision requires pretrial release of the defendant—even if, as in this case, the judicial officer determines that no release conditions can reasonably assure the defendant's subsequent appearance or the safety of the community. The court's remedy has predictable consequences. Upon release, the defendant is very likely to fulfill the judicial officer's expectations and flee the jurisdiction, resume his criminal activity or harm a member of the community. At the same time, this costly remedy does not cure any harm caused by the failure to hold a timely detention hearing. Indeed, a defendant who would have been detained following a prompt hearing has lost nothing by the delay.

The court of appeals' overly broad and ill-conceived remedy is unnecessary. Where a detention hearing has not been provided within the prescribed time limits, the competing interests are properly accommodated by ensuring that the defendant receives a detention hearing at the earliest practicable opportunity. This accommodation preserves the Bail Reform Act's fundamental objective of protecting the integrity of the judicial process and the safety of the public through the detention of persons who pose unavoidable risks of flight or danger to the community. It also protects the defendant's interests by assuring that once the court is informed of the delay it will provide the defendant what he is due—a prompt but deliberate determination of his entitlement to release.

This case demonstrates concretely the severe consequences of the court of appeals' remedy. The government was prepared to conduct a detention hearing at respondent's

initial appearance before a United States magistrate in Illinois. However, respondent, who was represented by counsel, agreed to postpone the detention hearing until his appearance before a United States magistrate in New Mexico. The government also was prepared to conduct a detention hearing at that time. However, the New Mexico magistrate continued the proceedings, and respondent, who again was represented by counsel, did not object to the continuance. Indeed, respondent did not object to the timing of the hearing until the day that the hearing took place. Thus, when the district court reviewed the magistrate's decision, the detention hearing had been held, and at that point no curative steps were necessary. Moreover, since the district court determined that, but for the delay, respondent should be detained, it turned out that the delay did not prejudice respondent at all.

The court of appeals' remedy has resulted in release of the respondent under conditions that the district court determined would not reasonably assure his appearance at trial or the safety of the community. To no one's surprise, respondent has fled the jurisdiction to avoid prosecution. The court's remedy has severely impeded the government's prosecution of a large-scale drug trafficker even though the procedural error did not prejudice respondent in any meaningful way.

ARGUMENT

A FAILURE TO COMPLY WITH THE FIRST APPEARANCE PROVISION OF THE BAIL REFORM ACT DOES NOT REQUIRE THE RELEASE OF A PERSON WHO WOULD OTHERWISE BE SUBJECT TO PRETRIAL DETENTION

A. The Bail Reform Act Does Not Require That A Person Who Has Been Detained Based On An Untimely But Otherwise Adequate Detention Hearing Must Be Released

1. The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, "represents the National Legislature's considered response

to numerous perceived deficiencies in the federal bail process." *United States* v. *Salerno*, 481 U.S. 739, 742 (1987). The Act substantially revised existing bail practices to address, among other matters, "the need to permit the pretrial detention of defendants as to whom no conditions of release will assure their appearance at trial or assure the safety of the community or of other persons." S. Rep. No. 225, 98th Cong., 1st Sess. 3 (1983).

The Bail Reform Act specifies the standards that judicial officers are to apply and the procedures that they are to follow in making pretrial release and detention decisions. See 18 U.S.C. 3142 (Supp. V 1987). Section 3142(f) of the Act states that upon motion of the government (or in certain circumstances, on a judicial officer's own motion) the judicial officer "shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(f) (Supp. V 1987). Section 3142(f) additionally states:

> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days.

Ibid.

This so-called "first appearance" provision has become a persistent source of pretrial disputes. The Bail Reform Act does not define the provision's central terms, such as "first appearance" and "good cause," which must be applied to the highly variable circumstances preceding trial; in addition, the provision is silent with respect to questions such

as whether the defendant can waive the right to a prompt detention hearing and how the time periods set forth in the statute should be calculated.[3]

The most significant dispute with respect to the "first appearance" provision involves the issue of remedy. The Bail Reform Act does not set forth what, if any, remedy is appropriate for a failure to observe the "first appearance" requirement. Nor does the legislative history of the statute shed any light on that question. The Senate Committee Report accompanying the Bail Reform Act, which is the principal source of historical guidance, is silent on the issue of remedy. See S. Rep. No. 225, *supra*, at 21-22.[4] As a result,

[3] As we explain in greater detail in our petition (at 9-10), the courts of appeals have disagreed on various issues, including whether a defendant may waive his right to an immediate detention hearing (compare *United States* v. *Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc), and *United States* v. *Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1985), with *United States* v. *Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985), and *United States* v. *Madruga*, 810 F.2d 1010, 1014 (11th Cir. 1987)); what constitutes a "first appearance" (compare *United States* v. *Maull*, 773 F.2d 1479, 1483 (8th Cir. 1985) (en banc), with *United States* v. *Al-Azzawy*, 768 F.2d at 1144, and *United States* v. *Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986)); when a judicial officer may enter a continuance *sua sponte* (compare *United States* v. *Alatishe*, 768 F.2d 364, 369 (D.C. Cir. 1985), with *United States* v. *Hurtado*, 779 F.2d 1467, 1475 (11th Cir. 1985)); and how weekends and holidays should be treated in calculating the time periods for a continuance (compare *United States* v. *Melendez-Carrion*, 790 F.2d at 991, with *United States* v. *Hurtado*, 779 F.2d at 1474 n.8).

[4] The Senate Report notes that the time limitations in the "first appearance" provision are the same as those in the pretrial detention provision of the District of Columbia Code. S. Rep. No. 225, *supra*, at 22. The District of Columbia Court of Appeals has held, however, that the government may move for detention under the local statute at any point in the judicial proceeding. See *Blunt* v. *United States*, 322 A.2d 579, 583 (D.C. 1974) ("There is no requirement under the statute that the government must make a motion for pretrial detention as soon as

the courts of appeals have divided sharply over the consequences that should flow when the detention hearing is not held "immediately" upon the defendant's "first appearance" before a judicial officer (as the particular court interprets that requirement). Some courts have held that a violation of the "first appearance" requirement does not prevent the government from seeking pretrial detention at a subsequent hearing. See *United States* v. *Vargas*, 804 F.2d 157, 162 (1st Cir. 1986); *United States* v. *Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc); *United States* v. *Hurtado*, 779 F.2d 1467, 1481-1482 (11th Cir. 1985). That is, even if the detention hearing is not held immediately upon the defendant's first appearance before a judicial officer, or within the short periods allowed for continuances, those courts have taken the position that the violation does not permanently disable the government from seeking, and the court from granting, pretrial detention if it is otherwise justified under the statute. Other courts, including the court below, have taken the opposite position, holding that once a violation of the "first appearance" requirement occurs, then the court may not grant a detention order no matter how compelling the case for detention may be. See *United States* v. *Al-Azzawy*, 768 F.2d at 1145; Pet. App. 15a.

2. This case presents the problem starkly. The court of appeals and the district court agreed that no conditions of release would reasonably assure respondent's appearance at trial or the safety of the community. They also concluded, however, that the magistrate had failed to comply with the

the grounds therefor become apparent or be thereafter foreclosed from making such a motion."). For that reason, there is seldom a need for the prosecution to seek a continuance of the detention hearing in local District of Columbia cases; the District of Columbia Court of Appeals therefore has not had occasion to address the question of what consequence should flow from the granting of an improper continuance under the local District of Columbia statute.

first appearance provision and that respondent was therefore entitled to pretrial release. Pet. App. 1a-3a, 16a-17a. Although it is by no means clear that the delay in holding the detention hearing violated the first appearance requirement, we have not challenged that aspect of the court of appeals' judgment in this case; instead, the sole question before this Court is whether the court of appeals fashioned the appropriate remedy for a "first appearance" violation.[5]

The court of appeals correctly recognized that the Bail Reform Act does not provide a remedy for noncompliance with the first appearance requirement. See Pet. App. 13a.

[5] As we note in the text, the question whether there was a violation of the first appearance requirement is not directly presented here; nonetheless, the Court may regard the point as pertinent to the question of remedy if, for example, the Court considers the appropriate remedy to depend on whether the statutory provision was unambiguous and the violation therefore clearly established. In our view, there was no violation here at all, and certainly not a clear-cut violation. We believe that the "first appearance" referred to in the statute means the first appearance after the filing of a motion for detention. See *United States* v. *Maull*, 773 F.2d at 1483. Once the government (or the judicial officer) moves for detention, the judicial officer must promptly hold a detention hearing, unless the judicial officer grants a continuance or the defendant waives his right to a hearing. In this case, the government was prepared to move for detention at respondent's February 10, 1989, initial appearance in Illinois, but respondent agreed to postpone the question of bail until his hearing in New Mexico. J.A. 14-19. At the February 16, 1989, hearing in New Mexico, the government expressed its intention to seek detention, but the magistrate granted a 3-day continuance without objection from either party to permit the preparation of a pretrial services report. J.A. 20-23. The magistrate held the detention hearing on February 21, 1989. J.A. 24-38. If, as we believe should be the case, respondent's "first appearance" for purposes of the Bail Reform Act is regarded as the February 16 hearing in New Mexico at which the government stated its intention to seek detention, and if the intervening weekend and holiday are not counted against the three-day continuance period, see *United States* v. *Melendez-Carrion*, 790 F.2d at 991, then the detention hearing here was timely.

It drew the wrong conclusion from that observation, however. The court reasoned that if the first appearance requirement is "to have any import," the consequences must be "substantive." *Id.* at 14a. Sensing an obligation to provide some kind of remedy, the court concluded that "the only meaningful remedy" was "release on conditions." *Id.* at 15a. This analysis was misguided. As we explain below, in the absence of express instructions from Congress a judicial remedy should be limited to curing any prejudice to the party, and non-prejudicial errors should be disregarded. This sensible principle has been endorsed by Congress and embraced in various decisions of this Court. The court of appeals erred in granting broader relief.

B. The Remedy For Failing To Hold A Detention Hearing at the Defendant's "First Appearance" Should Be To Hold A Detention Hearing At the Earliest Opportunity

1. Congress and this Court have consistently recognized that the ultimate goal of criminal procedure is a fair and just adjudication and that remedies for procedural errors must be responsive to that overarching objective. See *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369, 2373-2375 (1988). An unnecessarily broad remedy, as much as an inadequately narrow remedy, tends to undermine the criminal justice process. See, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). Thus, for more than a century, Congress has declared by statute that errors that do not affect substantial rights of the parties shall be disregarded. See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). Section 2111 provides that an appellate court "shall give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties." Similarly, Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Both provisions reflect Congress's judgment that prejudice is an

essential prerequesite to granting relief in a criminal case.[6] Similarly, this Court has stated that, even in the case of constitutional violations, "remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981).[7]

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[6] Although Rule 52(a) is a court rule and has never formally been enacted by Congress, it is clear that Congress intended that rule to govern harmless error questions and that the rule states congressional policy regarding the principles of harmless error. See *United States* v. *Lane*, 474 U.S. 438, 454-455 (1986) (Brennan, J., concurring in part and dissenting in part). Rule 52(a) was designed to take the place of two statutory provisions, 18 U.S.C. 556 (1946), and 28 U.S.C. 391 (1946). When Congress revised both the Criminal Code and the Judicial Code several years after adoption of the Federal Rules of Criminal Procedure, it relied on Rule 52(a) as the reason for repealing the two predecessor statutes so as to avoid redundancy. See H.R. Rep. No. 304, 80th Cong., 1st Sess. 8 (1947) ("effect was given to the changes [made by the Federal Rules of Criminal Procedure] by revising modified sections and repealing superseded provisions"); H.R. Rep. No. 308, 80th Cong., 1st Sess. A236 (1947) (former Section 391 is "superseded by Rule 61 of said Civil Rules, and Rule 52 of said Criminal Rules"). The following year, Congress enacted 28 U.S.C. 2111 to ensure that the harmless error provisions applicable to the district courts through the Civil and Criminal Rules would be applicable to appellate courts as well. See H.R. Rep. No. 352, 81st Cong., 1st Sess. 18 (1949).

[7] See also, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497 (1987) (erroneous jury instruction); *Rose* v. *Clark*, 478 U.S. 570, 577-579 (1986) (due process violation); *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) (Confrontation Clause violation); *United States* v. *Lane*, 474 U.S. 438 (1986) (misjoinder under Fed. R. Crim. P. 8); *Rushen* v. *Spain*, 464 U.S. 114, 117-120 (1983) (violation of right to be present at trial); *United States* v. *Hasting*, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of identification obtained in violation of right to counsel); *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972) (admission of confession taken in violation of Sixth Amendment); *Chambers* v. *Maroney*, 399 U.S. 42, 52-54 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970) (denial of right to counsel at preliminary hearing); *Harrington* v. *California*, 395 U.S. 250, 254 (1969) (improper admission of statement of nontestifying co-defendant); *Chapman* v. *California*, 386 U.S. 18 (1967) (comments on defendant's silence).

Congress and this Court have identified the competing interests in the Bail Reform Act. On the one hand, the government has a compelling interest in ensuring that persons are released on bail only under conditions that will assure their appearance at trial and the safety of other persons and the community. See *Salerno*, 481 U.S. at 747-749; *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979); *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951). On the other hand, the government must pursue that interest through judicial procedures that produce fair and reasonable pretrial release and detention determinations. See *Salerno*, 481 U.S. at 750-752.[8]

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[8] As the Senate Committee Report accompanying the Bail Reform Act explained:

> Where there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate. This rationale—that a defendant's interest in remaining free prior to conviction is, in some circumstances, outweighed by the need to protect societal interests—has been used to support court decisions which, despite the absence of any statutory provision for pretrial detention, have recognized the implicit authority of the courts to deny release to defendants who have threaten[ed] jurors or witnesses, or who pose significant risks of flight. In these cases, the societal interest implicated was the need to protect the integrity of the judicial process. The need to protect the community from demonstrably dangerous defendants is a similarly compelling basis for ordering detention prior to trial.
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> * * * * *
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> However, the Committee recognizes a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests

The remedy for a failure to comply with the Bail Reform Act's procedures should take into account these competing interests. In this case, the government has an obvious, powerful interest in securing the appearance of drug traffickers at trial and preventing them from resuming their illicit activities.[9] At the same time, any arrested person is plainly entitled to a prompt judicial assessment and determination of his entitlement to pretrial release. The remedy for failure to comply with the Bail Reform Act's time requirements for a detention hearing should be responsive to both concerns.

2. The court of appeals' sweeping remedy of automatic release on conditions fails to strike a proper balance. As this case graphically illustrates, a rule of automatic re-

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it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind.

S. Rep. No. 225, *supra*, at 7, 8 (footnotes omitted).

[9] The Senate Report explains:

> It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses. Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers.

S. Rep. No. 225, *supra*, at 20 (footnote omitted).

lease thwarts Congress's objective of providing rational and fair bail procedures. Prior to respondent's release, the government urged—and the district court determined—that *no* release conditions would reasonably assure respondent's appearance at trial or the safety of the community. The court of appeals nevertheless ordered conditional release. For his part, respondent immediately took the very step that the government and the court had predicted—he fled the jurisdiction to avoid prosecution. See p. 8, *supra*.

That result is fundamentally incompatible with "society's interest in the administration of criminal justice." *Morrison*, 449 U.S. at 364. Occasional procedural errors in the handling of detention hearings are inevitable, particularly since the Bail Reform Act requires the parties and the court to act with great dispatch in the often chaotic period following a defendant's arrest. If a procedural foul-up—even a minor one such as exceeding by one day the permissible period for holding a detention hearing—requires automatic release, no matter how strong the case for detention, many defendants charged with serious crimes can be expected to flee before trial—as respondent did here—or commit serious crimes while on release.

Indeed, we can say without exaggeration that the normal and expected consequence of the court of appeals' rule is increased fugitivity and criminality. After all, the only persons for whom the rule of automatic release will make a difference in their detention status are those who would otherwise be detained pending trial, *i.e.*, those for whom conditions of release will not "reasonably assure" their appearance at trial or the safety of the community. 18 U.S.C. 3142(e) (Supp. V 1987). A rule requiring release of such persons makes it highly likely that they will flee or harm other members of the community.

The court of appeals' rule of automatic release is especially perverse because it fails to provide any substantial counter-

vailing benefits. At the time a violation of the first appearance requirement is discovered, the defendant will have been detained without a hearing for a period of time. If the defendant would have been detained following a prompt hearing, then he has lost nothing by the delay. Indeed, a delay will often work to the defendant's advantage by providing him with additional time to prepare for the detention hearing. Cf. *Barker* v. *Wingo*, 407 U.S. 514, 521 (1972). In fact, it is commonly the case that where detention hearings have been found untimely, the defendant has requested or agreed to the delay. See *United States* v. *Hurtado*, 779 F.2d 1467, 1469, 1474 n.7 (11th Cir. 1985); *United States* v. *Al-Azzawy*, 768 F.2d 1141, 1144 (9th Cir. 1985). Compare *United States* v. *Clark*, 865 F.2d 1433 (4th Cir. 1985) (en banc) (defendant waived right to an immediate hearing); *United States* v. *Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1985) (accord).[10]

On the other hand, if the defendant would have been released following a prompt detention hearing, and the defendant has sought a prompt hearing, he has lost something because of the delay. But what he has lost—a period of time in detention—obviously cannot be returned to him. For that defendant, a prompt detention hearing after discovery of the violation will presumably lead to his release, so a rule of automatic release serves that defendant little better than a requirement that he be afforded a prompt detention hearing, with release to follow if he is found not to be detainable.

[10] As these cases demonstrate, the court of appeals' rule cannot be justified on the ground that the remedy is necessary to deter governmental misconduct. The violations of the first appearance provision in each of those cases resulted, as in this case, from difficulties that judicial officers encountered in interpreting the requirements of the first appearance provision.

A rule of automatic release thus provides defendants with an unjustified windfall; it does not remedy any prejudice that any defendant has suffered from the delay, and it may gravely prejudice the government and the public.[11] What is more, the court of appeals' rule, which absolves a defendant of any obligation to move to protect his own interests, produces a manifestly unfair situation of permitting a defendant to "sandbag" the government by remaining silent until the time limits have run, and then claiming immunity from detention. Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977). In fact, a rule of automatic release creates the greatest incentive for "sandbagging" in the cases in which the need for detention is the most compelling. Where it is clear that the likelihood is very high that the defendant will flee or commit other crimes while on release, the defendant's only hope for release is to remain silent and hope that the court stumbles into a violation of the first appearance requirement.

3. Where a detention hearing has not been provided within the prescribed time limits, the competing interests at stake are properly accommodated by ensuring that the defendant receives a detention hearing at the earliest practicable opportunity. This accommodation preserves the Bail Reform Act's fundamental objective of protecting the integrity of the judicial process and the safety of the public through the detention of persons who pose unavoidable risks of flight or danger to community.

This solution also serves the defendant's legitimate interest in a prompt detention hearing. Federal courts will, we believe, conscientiously attempt to comply with the "first

[11] Notably, the court of appeals' rule appears to prevent the judicial officer from detaining a person even if the failure to comply with the first appearance requirement occurs while the person is released on bond. See *United States* v. *O'Shaughnessy*, 764 F.2d 1035, appeal dismissed on rehearing as moot, 772 F.2d 112 (5th Cir. 1985).

appearance" requirement, and the prosecutor and the defendant's counsel will remind judicial officers of their obligation to do so. If a court fails to conduct a detention hearing in a timely manner, or the prosecutor fails to notify the court of the need to do so, a defendant normally can be expected to bring that error immediately to the court's attention. Once informed of the delay, the court can then be expected to provide the defendant what he is due—a prompt but deliberate determination of his entitlement to release.

The defendant can, of course, minimize the possibility that a judicial officer or the prosecutor may neglect to follow the prescribed time limits by affirmatively asserting his right to a timely detention hearing. There is nothing unreasonable or unfair in requiring a defendant to shoulder responsibility for protecting his own interests in this respect. And there is no reason to believe that defense counsel will fail to protect their clients' interests in securing a prompt detention hearing. Indeed, a defendant's failure promptly to assert his rights provides strong indication that he has suffered no prejudice from the delay, or even that he preferred having the additional time to prepare for the detention hearing.

The accommodation that we suggest, and particularly the requirement that the hearing be held as soon as practicable, also takes into account the judicial system's limited resources and the fact that in some circumstances, delays will simply be unavoidable. See *United States* v. *Ewell*, 383 U.S. 116, 120 (1966). The Bail Reform Act recognizes that the federal judicial system cannot react instantaneously to every problem, and it therefore authorizes judicial officers to continue detention hearings for "good cause." 18 U.S.C. 3142(f) (Supp. V 1987). By the same token, a judicial officer's obligation to correct a failure to hold a prompt detention

hearing must take into account other competing responsibilities and demands. We submit that requiring a judicial officer to take curative action as soon as practicable gives appropriate recognition to that concern.

4. Although the Bail Reform Act provides for a prompt detention determination, it does not impose that requirement at all costs. As previously explained, a judicial officer may continue a hearing for "good cause." 18 U.S.C. 3142(f) (Supp. V 1987). The Act, which does not require a judicial officer to make his decision within a specified time, also provides that a defendant may be detained pending completion of the hearing and that the judicial officer may reopen the hearing at a later date. 18 U.S.C. 3142(f) (Supp. V 1987).[12] And even the court of appeals in this case apparently recognized that a judicial officer may stay a release order (as was done here, Pet. App. 8a) pending further review. Cf. *Hilton* v. *Braunskill*, 481 U.S. 770 (1987). Thus, the structure of the detention procedure under the Bail Reform Act indicates that the requirement for a prompt determination of the detention issue is not as rigid as the court of appeals' ruling would suggest, and that the defendant's interest in a prompt detention determination may at times be subordinated to other competing concerns.

The court of appeals' rule of automatic release is also difficult to reconcile with other provisions of the Bail Reform Act applying to the conduct of detention hearings. The Act

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[12] Section 3142(f) also provides:

> The person may be detained pending the completion of the hearing. The hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

18 U.S.C. 3142(f) (Supp. V 1987).

confers a variety of other procedural protections on persons subject to detention motions, including protections that are at least as important as the "first appearance" requirement. Yet those protections are undoubtedly subject to harmless error analysis. For example, Section 3142(f) states that the arrested person shall have the right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed. 18 U.S.C. 3142(f) (Supp. V 1987). It also states that the person shall be entitled to present evidence through testimony or proffer, that the rules of evidence shall not apply in the hearing, and that the facts upon which a judicial officer relies in imposing detention must be supported by clear and convincing evidence. 18 U.S.C. 3142(f) (Supp. V 1987). No one has suggested that a mistaken but non-prejudicial application of any of these procedural provisions would warrant reversal of a detention decision. There is nothing unique about the "first appearance" requirement, and thus no reason to create a special remedy for violations of that provision.

C. Respondent Suffered No Prejudice As A Result Of The Delay In This Case

Respondent was apprehended on February 8, 1989, was charged in a criminal complaint on Friday, February 10, 1989, and was taken before a United States magistrate in Illinois on that date. The government was prepared to conduct a detention hearing at that time; however, the government reached agreement with respondent, who was represented by counsel, to postpone respondent's detention hearing until he was returned to New Mexico. The government returned respondent to New Mexico the same evening (February 10) and promptly contacted the magistrate's office on Monday morning, February 13, to arrange for a detention hearing. The magistrate's office scheduled the

hearing for February 16, 1989. Respondent took no steps between February 10 and February 16 to accelerate the hearing.

At the February 16th hearing, respondent's counsel (who apparently was unaware that respondent had specifically agreed to a detention hearing in New Mexico) objected to the government's failure to move for detention before the magistrate in Illinois. But she did not even suggest, much less argue, that the New Mexico magistrate's decision to continue the hearing for "three working days" to permit the preparation of a pretrial services report violated the first appearance provision, and she did not object to the continuance. Respondent took no steps between February 16 and February 21 to accelerate the hearing. Indeed, respondent did not interpose an objection to the timing of the hearing until February 21, 1989, the date that the hearing took place. See Opposition to Detention of the Defendant Without Bond (Feb. 21, 1989).

Thus, when the district court reviewed the magistrate's decision, the detention hearing had been held, and at that point no curative steps were necessary. Furthermore, the magistrates' supposed errors (but see note 5, *supra*) in permitting respondent to postpone a detention hearing at the February 10th removal proceeding, in scheduling the detention hearing for February 16, and in continuing the February 16th detention hearing did not prejudice respondent. The lower courts did not find, nor is there any basis for assuming, that the delays prejudiced respondent in his ability to defend against the detention motion or to defend against the underlying allegations in the case. To the contrary, respondent presumably agreed to the February 10th postponement because it was in his interest: the postponement, after all, allowed him to retain counsel from his home town and to contest detention in a more convenient forum. Furthermore, there is no indication in the record that respondent was prepared to proceed with a detention hear-

ing prior to February 16th. Indeed, it is likely that respondent's retained counsel, who "was hired by [respondent's] family about three hours [before the February 16th hearing]" (J.A. 21), welcomed the continuance.

The only prejudice respondent could have suffered from the delay in holding the detention hearing arose from the prospect that he might be held in custody for a few days longer than he would have been if the hearing had been held earlier and the district court had decided that respondent should be released. Since the district court determined that, but for the delay, respondent should be *detained*, it turns out that the delay did not prejudice respondent at all. The district court presumably would have reached the same conclusion following an earlier detention hearing and would have ordered respondent detained for the entire period before trial.

Respondent's own conduct suggests that he did not view the delays as prejudicial. Although represented by counsel, respondent did not insist on a prompt detention hearing. Quite to the contrary, he specifically waived his right to an immediate detention hearing before the Illinois magistrate; he did not object to the New Mexico magistrate's decision to continue the hearing for three working days; and he did not move to accelerate the hearing during that period. Respondent's failure to insist on a prompt hearing butresses the conclusion that he suffered no prejudice, and indeed perhaps obtained some advantage, from the delay. See, *e.g.*, *United States* v. *Fortna*, 769 F.2d 243, 248-249 (5th Cir. 1985).

Finally, in examining the issue of prejudice, it is worth noting that the case against respondent on the merits was virtually airtight. He was caught in possession of a huge amount of cocaine and a large amount of cash. He admitted that he was aware of the drugs in his truck and intended to deliver them to Chicago. His guilt was therefore clear.

And because he was found in possession of more than five kilograms of cocaine, he was subject to a mandatory minimum sentence of not less than 10 years' imprisonment. 21 U.S.C. 841(b)(1)(A). Besides bearing on the propriety of detention in the first place, the strength of the case against respondent helps establish that the delay in holding the detention hearing did not work to his prejudice. Not only was respondent not likely to be released pending trial, but he was also singularly unlikely to be acquitted. Respondent was therefore not a person for whom the procedural protections of the pretrial detention statute are the most important: one who stands a good chance of not being convicted and for whom detention, if it is ordered, may result in pretrial incarceration in spite of his ultimate vindication after trial.

* * * * *

As this case shows, the court of appeals' overly broad and ill-conceived remedy imposes great costs on the criminal justice system with no corresponding benefits. A rule of automatic release, regardless of the degree of prejudice and the risks associated with release, converts the pretrial detention process into " 'a game in which a wrong move by the judge means immunity for the prisoner.' " *Jones* v. *Thomas*, 109 S. Ct. 2522, 2528 (1989). This surely does not serve Congress's intent in crafting the Bail Reform Act's pretrial detention provisions. In contrast, the alternative that we urge ensures that the defendant is afforded a prompt detention hearing as soon as practicable after a first appearance infraction is discovered, and thus fully protects the individual's interests without infringing the competing interests of society, the courts, and the criminal justice system.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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NOVEMBER 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—262 201:00005